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In the Supreme Court of the United States

OCTOBER TERM, 1982

ROTH'S I.G.A. FOODLINER, INC., PETITIONER
v.
NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether, in the circumstances of this case, the National Labor Relations Board reasonably found that the meat department employees in one of petitioner's stores did not constitute an accretion to the existing bargaining unit covering petitioner's other stores but rather constituted a separate appropriate bargaining unit.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is unpublished. The decision and order of the National Labor Relations Board is reported at 259 N.L.R.B. 132. The supplemental decision and direction of election of the Regional Director (Pet. App. A5-A20) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on October 29, 1982. The petition for a writ of certiorari was filed on January 21, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, provide:

> Section 8(a)(1) and (5), 29 U.S.C. 158(a)(1) and (5). It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).
>
> * * * * *
>
> Section 9(a) and (b), 29 U.S.C. 159(a) and (b). Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *
>
> (b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: * * *

STATEMENT

1. Petitioner ("the Company") operates nine retail food stores within a 50-mile radius of Silverton, Oregon, where its principal store and headquarters are located. Its store in Canby, Oregon, opened in May 1980, and in June 1980 the

United Food and Commercial Workers, Local 143-A ("the Union") petitioned the Board for a representation election among the store's meat department employees (Pet. App. A7, A10). The Company opposed the petition, urging that these employees should be accreted to the bargaining unit consisting of all meat department employees in its other Oregon stores (Pet. App. A8).

After a hearing, the Board's Regional Director concluded that the Canby store meat department was an appropriate bargaining unit. He explained that a single-store unit is presumptively appropriate in the retail sales industry (Pet. App. A1, A3) and found that the presumption was not overcome here. In so finding, the Regional Director noted that six of the seven employees who opened the Canby store meat department were new hires and that there was an insignificant interchange of employees between the Canby store and the Company's other stores (Pet. App. A15-A16). He further noted that only one employee, who was not replaced, transferred to another Company store and that, except for the first week after the store opened, no employees temporarily transferred between the Canby store and the Company's other stores (Pet. App. A12-A13).[1] In addition, he found it significant that the union that represented the employees in the Company's other meat departments was uncertain whether it had jurisdiction over the Canby store[2] and, in any event, showed no interest in representing the Canby employees (Pet. App. A9, A16).

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[1]In contrast, of the approximately 80 to 90 meat department employees at the Company's other stores, about 21 were involved in at least 35 different transfers from one store to another (RX 3; Tr. 104). ("RX" refers to petitioner's exhibits filed in the Board's representation proceeding; "Tr." refers to the transcript of the representation hearing.)

[2]The United Food and Commercial Workers International Union, with which both Local 1011 and the Union are affiliated, determined that the Union, not Local 1011, had territorial jurisdiction over Clackamas County, in which Canby is located.

Rejecting the Company's assertion that the Canby meat department employees should be considered an accretion to its other eight facilities (Pet. App. A8, A14-A15), the Director explained that, in order to preclude disenfranchising employees who have not previously voted to establish a multi-location unit, "the Board will not 'under the guise of accretion' compel employees who may constitute a separate appropriate unit to be includ[ed] in an overall unit" (Pet. App. A15), citing *Melbet Jewelry Co.*, 180 N.L.R.B. 107 (1969).[3]

The Board denied the Company's request for review of the Regional Director's unit determination. The Board subsequently found that the Company's refusal to bargain with the Union violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), and issued a bargaining order (259 N.L.R.B. 132, 134-135 (1981)).[4]

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[3]In *Melbet*, the Board held that where, in a retail chain-store operation, both a single-store unit and a multi-store unit would be appropriate, it would not consider a new single store to be an accretion to an existing unit. Despite the fact that the stores were geographically proximate and had centralized management, the Board found that the single store was an appropriate unit since the employees at that store were new hires, there was a lack of employee interchange with the other stores, and the store manager had day-to-day control over employee relations (180 N.L.R.B. at 109).

[4]The election resulted in a tie vote. However, the Union filed objections to the election, as well as the instant unfair labor practice charges, and alleged that petitioner had engaged in unlawful conduct during the course of the election campaign. The parties entered into a stipulation in which petitioner withdrew its denial of the unlawful conduct alleged but preserved its position that the Canby meat department employees constituted an inappropriate unit. The stipulation further provided that a bargaining order would be the appropriate remedy should that unit be found appropriate (259 N.L.R.B. at 132-133).

2. The court of appeals by memorandum order enforced the Board's order, holding that substantial evidence supported the Board's conclusion that the employees in the Canby meat department constituted an appropriate bargaining unit (Pet. App. A2). The court stated that (Pet. App. A3):

> the meat department employees at the new store had a separate identity from those at Roth's other stores, * * * Roth's central management did not perform day-to-day supervision at the store, and * * * the new store was not geographically proximate to Roth's other locations. Further, the bargaining history at Roth's other stores shows that union jurisdictional boundaries precluded the preexisting union from representing the new employees. Based upon these unrebutted facts, Roth's IGA failed to overcome the NLRB presumption that a single store unit is an appropriate unit in the retail sales industry [citations omitted].

ARGUMENT

In order to protect the right of employees to choose whether they want union representation and to select their own bargaining agent, a group of employees is not deemed an accretion to an existing unit unless the party seeking the accretion shows not only that the expanded unit is appropriate, but also that "the new employees have no separate identity from employees in the existing unit * * *." *NLRB* v. *Retail Clerks Local 588*, 584 F.2d 987, 987 (9th Cir. 1978). See also *NLRB* v. *Security-Columbian Banknote Co.*, 541 F.2d 135, 140 (3d Cir. 1976); *Boire* v. *Int'l Brotherhood of Teamsters*, 479 F.2d 778, 795-796, 798-799 (5th Cir. 1973); *Westinghouse Electric Corp.* v. *NLRB*, 440 F.2d 7, 11 (2d Cir.), cert. denied, 404 U.S. 853 (1971); *Sheraton-Kauai Corp.* v. *NLRB*, 429 F.2d 1352, 1354, 1355-1357 (9th Cir. 1970); *Melbet Jewelry Co.*, 180 N.L.R.B. 107, 109-110

(1969). Accordingly, in determining whether a new store may be accreted to an existing unit, the Board determines whether the employees of that store could appropriately be represented in a separate bargaining unit. In making that determination, the Board looks to such factors as the degree of centralized managerial control, the extent of employee interchange, the integration of operations, the geographical proximity of the operations, and the prior bargaining history. *Kaynard* v. *Mego Corp.*, 633 F.2d 1026, 1030-1031 (2d Cir. 1980); *NLRB* v. *Sunset House*, 415 F.2d 545, 548 (9th Cir. 1969).

Petitioner does not dispute these settled principles. Rather it contends that the Board and the court of appeals erred in concluding that the facts of this case did not support a finding of accretion. This fact-bound issue does not warrant review by this Court. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). In any event, the Board's unit determination here was a reasonable exercise of its broad discretion in representation matters. *South Prairie Construction Co.* v. *Local No. 627, International Union of Operating Engineers*, 425 U.S. 800, 805 (1976); *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, 491 (1947).

1. Petitioner contends (Pet. 14-17) that the decision below conflicts with decisions of other circuits applying the Board's accretion principles. However, the cases relied on by petitioner are all distinguishable.[5]

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[5]With the exception of *Universal Security Instruments, Inc.* v. *NLRB*, 649 F.2d 247 (4th Cir.), cert. denied, 454 U.S. 965 (1981), none of the cases relied on by petitioner involved an accretion situation. They all involve situations where a union sought to represent only one store of a chain or only one part of a multi-branch organization.

In *NLRB* v. *Purity Food Stores, Inc.*, 376 F.2d 497 (1st Cir.), cert. denied, 389 U.S. 959 (1967) (Pet. 15), the court rejected a single-store bargaining unit where, in addition to centralized and integrated personnel practices and procedures, there were frequent interchanges of employees (376 F.2d at 501). The court reasoned (*ibid.*) that, due to the frequent interchange of employees, a single-store bargaining unit could result in nonunion employees working beside employees under union rules concerning wages, hours, seniority, and grievance procedures. The same court, however, has upheld single-store units where, as here, there is little employee interchange and the store manager has authority over day-to-day working conditions. *Banco Credito y Ahorro Ponceno* v. *NLRB*, 390 F.2d 110, 112 (1st Cir.), cert. denied, 393 U.S. 832 (1968).

In *Universal Security Instruments, Inc.* v. *NLRB*, 649 F.2d 247 (4th Cir.), cert. denied, 454 U.S. 965 (1981) (Pet. 15), the court rejected the Board's single-plant unit determination because, among other things, the plant at issue was established to supplement another of the company's plants; a significant number of employees from the established, unionized plant transferred to the new plant; and both plants drew their workers from the same metropolitan labor pool (649 F.2d at 254). All of these factors and especially the numerous inter-plant employee transfers distinguish *Universal Security Instruments* from the present case. On the other hand, in *NLRB* v. *Quaker City Life Insurance Co.*, 319 F.2d 690, 692-693 (4th Cir. 1963), the same court upheld the Board's single-office unit determination on facts similar to those here.

In *Wayne Oakland Bank* v. *NLRB*, 462 F.2d 666, 668 (6th Cir. 1972) (Pet. 16), where a single-branch bargaining unit was found inappropriate, the Sixth Circuit focused upon the "substantial employee interchange" and relied on the First Circuit's decision in *Purity Food Stores*, which

outlined the problems that could result if a single-store bargaining unit were approved in such a situation. And in *NLRB* v. *Pinkerton's, Inc.*, 428 F.2d 479 (6th Cir. 1970) (Pet. 16), where a multi-office bargaining unit was sustained, the court found that there was close district-wide supervision over all guard operations in the district, that the company's collective bargaining history showed that bargaining had almost always been conducted on a district-wide basis, and that guards were transferred within the district (428 F.2d at 483). However, in *NLRB* v. *Forest City Enterprises, Inc.*, 663 F.2d 34, 35-36 (6th Cir. 1981), the court upheld a single-store bargaining unit where there was little employee interchange, the manager controlled the day-to-day operations, and the union organizational attempts occurred only at the single-store level. See also *Michigan Hospital Service Corp.* v. *NLRB*, 472 F.2d 293, 296 (6th Cir. 1972) (single-office unit determination appropriate where the office manager possessed considerable autonomy over personnel matters).

The Seventh Circuit's decision in *NLRB* v. *Chicago Health & Tennis Clubs, Inc.*, 567 F.2d 331 (1977), cert. denied, 437 U.S. 904 (1978) (Pet. 14), is also factually distinguishable from the present case. There the court rejected the Board's single-unit determination because permanent and temporary transfers occurred frequently, the history of collective bargaining showed that unionization had always been district-wide, and the company's operations were highly centralized (567 F.2d at 336-338). Significantly, in that same decision, the court approved the Board's determination that a single club owned by the Chicago Health Tennis Clubs was an appropriate bargaining unit since there was no prior history of collective bargaining and [illegible] interchange of employees other than trainees among the various clubs (*id.* at 339, 340). See also *Walgreen Co.* v. *NLRB*, 564 F.2d 751, 754 (7th Cir. 1977) (single-retail-store

bargaining unit appropriate where there was an insubstantial amount of employee interchange and local store manager exercised control over day-to-day employment activities).

2. There is also no merit to petitioner's contention (Pet. 17-20) that the decision below conflicts with Board precedents allegedly holding that a single-store unit is inappropriate if the employees involved are new hires and the union that represents the employer's other employees disclaims jurisdiction. First, contrary to petitioner's assertion (Pet. 17), the Board did not rely solely on those two factors in making its unit determination here. As previously noted (*supra*, pages 3-5), the Board and court of appeals also relied on the insignificant interchange of employees between the Canby location and the Company's other stores and the lack of day-to-day supervision at the Canby store by central management.

Moreover, the cases upon which petitioner relies either support the result reached here or are factually distinguishable. In *Bowman Transportation, Inc.*, 230 N.L.R.B. 935, 936 (1977) (Pet. 18), the Board found that a new terminal was not an accretion to an existing unit for essentially the same reasons given here. In *Universal Security Instruments, Inc.*, 250 N.L.R.B. 661 (1980), modified on other grounds, 649 F.2d 247 (4th Cir.), cert. denied, 454 U.S. 965 (1981), the Board found an accretion because a new plant was found to constitute an expansion of an existing plant (see 649 F.2d at 254). Obviously, no such finding could be made here. In *White Castle Systems, Inc.*, 264 N.L.R.B. No. 43 (Sept. 29, 1982) slip op. 7 (Pet. 20), and *The Lawson Milk Co., Division, Consolidated Foods Corp.*, 213 N.L.R.B. 360, 361-362 (1974) (Pet. 19-20), the Board found that the presumption of the appropriateness of a single-store unit was rebutted by evidence, *inter alia*, of extensive employee interchange and lack of local autonomy. In *Building*

Construction Employer's Ass'n, 147 N.L.R.B. 222, 223-224 (1964) (Pet. 18), and *Groendyke Transport, Inc.*, 171 N.L.R.B. 997 (1968), the Board rejected union requests for units coextensive with their territorial jurisdiction. In *Building Construction*, the Board noted that the requested unit would encompass the employees of 165 separate employers and that only a few of those groups had relinquished their right to bargain individually. And, in *Groendyke*, the Board found that the presumptive appropriateness of single-terminal units was not overcome where there was no geographic or administrative cohensiveness to the regional unit sought by the union.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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